

# Turning EU Citizenship into a Viable Tool of EU Federalism

**VB** [verfassungsblog.de/turning-eu-citizenship-into-a-viable-tool-of-eu-federalism-2/](http://verfassungsblog.de/turning-eu-citizenship-into-a-viable-tool-of-eu-federalism-2/)

Dimitry Kochenov Mi 2 Okt 2013

It has traditionally been assumed that the Internal Market is supposed to deliver on the grand promises of European Integration: peace, prosperity, and better life for all. With the increasing complexity of the Union and the fall in the legitimising appeal of the initial promise – the EU's would-be messianism ([Weiler, SJLS 2012](#)) let alone the emergence of a Euro-centric civil religion following the US example ([Bellah, Dædalus 1967](#)) can safely be discarded in the present context of crisis and scepticism – it is the Internal Market and nothing else, that seems to be standing behind the current reality of European Unity. Although the correctness of this statement depends on the country, no doubt and might be less true for the East of Europe than for the West, the core idea is there: ironically, dozens of years after the European Economic Community turned into the European Union in a most complex game of texts and facts ([Eijssbouts, UvA, 2001](#)), we are (still) speaking of the EU as an *economic* organisation. The Internal Market, which was one among many in a potential palette of the tools of integration became seemly the only tool ([Kochenov, CYELS 2013](#)). Problems with this are numerous: the grand promise of peace, prosperity and better life for all is still there and should not be discarded or forgotten, it seems, no matter how much support they could aspire to generate in the streets of Athens, Rome and Glasgow. Moreover, the Union has moved on from the customs union and the four types of free movement: it is about so much more now, compared even with 20 years ago. To present the Internal Market as the only tool of European Integration is thus most probably wrong. Yet, what should the alternatives be? What else can be deployed to underpin the core of EU integration next to the internal market?

## EU Citizenship as a tool of integration alongside the Internal Market

It is to respond to this question that a number of leading scholars on EU citizenship gathered in Oslo on [September 13–14, 2013](#) in a conference jointly organised by the University of Groningen (Kochenov) and the University of Oslo (Wiesbrock) on *The Right to Have What Rights? EU Citizenship's Role Reconsidered*. The reasons for turning to EU citizenship in search of the answers are numerous. Firstly, the EU is so markedly different from the majority of other international integration projects precisely because of the role of the individuals. Supranationalism, direct effect, human rights protection etc. are all about precisely this: the citizen. Moreover, the very promises contained in the Treaties are addressed to no one else but the citizens. Presenting the Internal Market as the only tool of EU integration in this context would be highly incorrect: the Internal Market is but a tool and EU citizenship could become another.

That it is EU citizenship and not some other organising idea is a matter of convenience and availability: while, say, justice or equality are out of question (e.g. [Williams, CUP 2010](#)), as, expectedly, is democracy, citizenship has been growing in importance and rose to prominence in the recent decades (e.g. [Kochenov and Plender ELRev. 2012](#)): it thus seems to be the only powerful idea next to the Internal Market – yet a broader one and with a more humanistic appeal – to provide the European unification project with a new understanding and a renewed boost for development. Crucially, the recent case law of the ECJ also demonstrates with abundant clarity that EU citizenship, alongside the Internal Market, is starting to play a role of an independent activator of EU law (e.g. [Lenaerts, JFMWEU 2012](#)): no Internal Market-minded “cross-border element” is necessarily required as the “substance of rights” of EU citizenship plays this role.

## Entering a simple labyrinth of many questions and hanging hats around

EU citizenship is thus not only available for deployment. It is already working (do not, by the way, be misled by the outcomes in *McCarthy*, *Dereci* etc.: the principle is there if you read the judgments carefully). Yet, to say that EU citizenship is capable of playing a definitive role in the shaping of EU integration, with all its potential, that of setting

and shifting the border between the national and the supranational, also opens [Pandora's box of important problems](#). Once the formalism of the “cross-border” is laid to rest, the issues of equality, justice and democracy will actually arise, bringing about the need to rethink the basics of the Union in Europe. Yet, is it not true that confronting these issues is actually a sign of maturity? The right questions will have to be asked (and answered), whether the world of the wholly internal situations and the Internal Market as such – as the answer to the federal question uttered in a highly-theorized isolation from real life – can provide the needed answer. Umberto Eco, in an informative book about signs and interpretation ([Bompiani, 2007](#)) teaches us about the simplest form of a labyrinth: the linear one: once one is in, the Minotaur will be found: the whole point of the labyrinth is to make this possible. Ironically, Ariadna is then redundant.

EU citizenship is thus not the thread – it is the gate. And there can be many others. Yet, this is the first one in sight. Rather than fetishizing citizenship, the idea is to use the category which is at hand. Given divergent and conflicting opinions on citizenship, and the different disciplines from which scholars approach related issues, it is no surprise that the two days of the conference were marked by fierce debates on the scope and content of citizenship. It would be misleading, however, to expect to agree completely on this issue. It was clear that some of these conflicts arise from the need to reconcile citizenship with existing legal categories such as human rights as Daniel Thym pointed out, or the powers conferred on/ claimed by the Member States to deal with the wholly internal situations as Johanna Croon indicated.

The need to transcend these legal categories and conceptualise citizenship as a tool for improving the liberty and quality of life of the individual was brought out by Gareth Davies and Niamh Nic Shuibhne, when they concurred that there is a necessity to ‘hang the hat on being nice to people on citizenship’ (see also [Davies, ELRev 2005](#) and [Davis, 1983](#)). The Dutch Ambassador to Norway, Bea ten Tusscher, identified the interest in citizenship as a sign of the times in the opening speech, where the *homo economicus* is making space for a humane European. She also indicated how the current unfavourable economic tide leads one to wonder ‘how much is left in my pocket’ at the cost of whether rights in Europe could lead to an improvement in the overall situation. This occupation with immediate financial concerns relegates other problems with leading better lives to the background: long-term vision is undermined. Given that there is no category that encompasses uniquely non-economic rights within the purview of EU law, European citizenship provides a seemingly natural mechanism to shift the concentration to freedom, security and justice from a market-oriented vision of what the Union is about: an alternative to the market paradigm of European integration.

## Which rights are we speaking about?

Fearing that EU citizenship may exist only in theory and have no practical consequences, Uladzislau Belavusau, speaking on the sexual rights in the EU has provocatively queried whether the rhetoric of citizenship can instigate political action, or how citizenship can be effectively enforced. Yet, as reported by Federico Fabbrini, political rights of EU citizenship do most likely belong to the core of citizenship rights to be defended supranationally, to which the case of *Eman and Sevinger* also testifies.

Though the question as to whether the Commission can bring direct action against Member States for violation of citizenship rights remains unresolved, cases such as *Ruiz Zambrano* have undoubtedly demonstrated that the ECJ can invoke an unwritten rights catalogue to protect Member States’ nationals in their capacity of EU citizens. More importantly still, any right proclaimed to be belonging to the essence of rights of EU citizenship becomes a potential natural-born federalizer as it can activate EU-level intervention no matter how the Internal Market-thinking treats the issue: the main danger of all the recent developments in the citizenship field.

The key way of observing the practical life of European citizenship is thus to take note of the diverse areas of law it has pervaded. One of the key questions at the conference was to try to identify the rights belonging to the plethora of the now proverbial ‘substance of rights’ of EU citizenship rights. Those will play the role of ‘cross border situations’ under the citizenship paradigm of European integration. On analysing different areas of law such as direct taxation

and cross-border health, Alina Trifonidou finds different shades of federalism, and an inconsistent application of EU citizenship rights. Other than the impact of such inconsistent application on areas close to home such as family reunification as Peter Van Elsuwege has highlighted, or care, as explored by Nathan Cambien, it affects the rights of third country nationals, criminal justice (as Tony Marguery and Hanneke van Eijken demonstrated), and even extends to previously unnoticed areas of law. Jeanne Mifsud Bonnici has been searching for new privacy safeguards to counter new surveillance especially for non-suspects, and has queried whether EU citizenship could fill in this gap. The right to private life under Article 8 ECHR is not sufficient to capture advances in technology which may lead to a potential infringement of privacy – can this area of law be a candidate for the new *Ruiz Zambrano* to emerge? Janek Novak has also raised the fascinating question whether citizenship can be a tool for re-examining controversial and unresolved issues such as the legality of imprisonment as a restriction on the free movement of citizens as well as a tool of applying proportionality to reassess the legality of life imprisonment and other particularly harsh modes of punishment.

While it is too premature to catalogue which rights fall into the ambit of citizenship, and, in particular, which of them will serve as the activators of supranational law under the citizenship paradigm of European integration, Martijn van der Brink has demonstrated that a restrictive interpretation of ‘the substance of rights’ could seriously impair the fundamental rights enjoyed by EU citizens. Extreme caution is definitely required in restricting essential rights. In a similar vein, Sara Iglesias Sánchez has clearly shown that limiting citizenship to cases only when there is evidence of movement within the EU would dilute the substance of the right to stay at home. The majority of citizens never switch countries and building the national/supranational divide pretending as if this were not the case is not sustainable.

## **The organising principle of the European federal polity**

In the final analysis, it is impossible but to agree with Antje Wiener’s assessment that citizenship, most broadly conceived, should be the organising principle of the European federal polity. As cases such as *Kadi* clearly demonstrate, if a State fails in its responsibility as a moral actor, then there should be avenues for contestation. This is exactly what citizenship provides. Importantly, the contestation does not only concern the grant of or the deprivation of a right, but also the exact placing of the boundaries of the legal orders, as in *Ruiz Zambrano*, which – although essential in the life of any federation – is never a technical issue. Citizenship thus flashes out threats and hindrances on peoples’ freedoms and aspirations in leading meaningful lives, which are rendered invisible in a market paradigm. Blurring and obscuring the issues of justice, equality and democracy is one of the market paradigm’s most dangerous features, undermining the Union’s future. We will definitely hear more about the actual potential of EU citizenship in the near future: many a difficult question will gradually be resolved, but the pedestal of the market paradigm of European integration has been definitely shaken.

For a detailed analysis this process, including the contributions of the participants of the Oslo event, look out for the volume on “EU Citizenship and Federalism: The Role of Rights”, which is being prepared for Cambridge University Press and is due to arrive at the shops in less than two years from now (D.Kochenov, ed.).

---

**LICENSED UNDER CC BY NC ND**

SUGGESTED CITATION Kochenov, Dimitry: *Turning EU Citizenship into a Viable Tool of EU Federalism*, *VerfBlog*, 2013/10/02, <http://verfassungsblog.de/turning-eu-citizenship-into-a-viable-tool-of-eu-federalism-2/>.